

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
MISSOURI RIVER ABOVE HOLTER DAM BASIN (41I)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Brewer Ranch LLC

OBJECTOR: United States of America (Bureau of Land
Management)

CASE 41I-2003-R-2023

41I 21430-00

41I 21431-00

41I 198721-00

41I 198725-00

41I 207139-00

41I 207141-00

41I 207143-00

41I 207144-00

41I 207145-00

41I 207146-00

41I 207147-00

ORDER ON PENDING OBJECTION AND MOTIONS

Brewer Ranch LLC (“Brewer Ranch”) objects to an order issued by the Senior Water Master in this basin rejecting Brewer Ranch’s counterobjections to its own water right claims. As alternate relief, Brewer Ranch asks the Court to either grant a motion to amend the claims or call the claims in on motion for purposes of determining whether they accurately reflect historical use or require modification.

BACKGROUND

The Water Court included the eleven claims in this case in the Preliminary Decree for the Missouri River Above Holder Dam Basin (Basin 41I). Brewer Ranch owns the

claims. Some of the claims are for irrigation use and others are for stock use. Some of the claims also have issue remarks.

The Court issued the Preliminary Decree on June 24, 2022. The Court set a deadline of December 21, 2022 to file objections. The Court sent notice of the decree to all water users in the basin, including Brewer Ranch. The Court also published notice of the decree in various regional newspapers and on the Court's website. The Court later extended the objection deadline to January 20, 2023. The Court provided notice of the objection extension in newspapers and on the Court's website.

Brewer Ranch did not self-object to any of the claims in this case prior to the extended deadline. On April 3, 2023, Brewer Ranch filed counterobjections to its eleven claims. (Doc. 1.00). On April 14, 2023, the Senior Water Master issued an order rejecting Brewer Ranch's counterobjections. (Doc. 2.00). Brewer Ranch responded on April 20, 2023 by filing an "Objection to Order Rejecting Counterobjection Filings, Motion to Amend, and Request to Call Claims in On Motion" ("Response"). (Doc. 3.00). Brewer Ranch included with the Response a letter from Otto W. Ohlson to the Department of Natural Resources and Conservation ("DNRC") dated December 15, 2021, and marked as received by DNRC on December 27, 2021.¹ ("Ohlson Letter"). Brewer Ranch also supplemented its Response with a sworn statement from Rod Brewer, Brewer Ranch's president. ("Brewer Statement") (Doc. 4.00).

DISCUSSION

Brewer Ranch raises three issues in its response. First, Brewer Ranch argues the Master's Order conflicts with the Court's practice of accepting counterobjections to a claimant's own water rights. Second, Brewer Ranch moves to amend its claims to reflect the period of use modifications it seeks in its counterobjections. Third, Brewer Ranch asks the Court to call the claims in on motion to address the counterobjections. The Court addresses each issue in turn.

¹ Somewhat confusingly, the Ohlson letter bears a second and third stamp indicating receipt by DNRC on January 3, 2022 and January 6, 2022.

1. *Does the Master's Order conflict with Water Court practice to accept counterobjections to a claimants' own water right claims?*

The Montana Water Use Act sets the procedure for filing and addressing objections after issuance of a preliminary decree. The process begins with an objection period. The Act states objections “*must be filed* with the water judge within 180 days after entry of the temporary preliminary decree, preliminary decree, or supplemental preliminary decree.” Section 85-2-233(2), MCA (emphasis added). The Act allows for extensions of the objection deadline, as was done in this basin, but extensions do not change the mandatory obligation to file objections within the objection period.

The Act next provides for a counterobjection period, but also states that if a claim receives objections, the Court “must allow an additional 60 days for the party whose claim received an objection to file a counterobjection to the claim or claims of the objector.” Section 85-2-233(3), MCA. The plain language of this provision predicates the right to file a counterobjection on the condition that a claim first receive an objection. The Water Court’s rules state that “[c]ounterobjections must be filed in compliance with § 85-2-233, MCA”.

The Court addressed the interpretation of the Water Use Act’s counterobjection provision in *In re McDowell*, 2019 Mont. Water LEXIS 222 (Order Rejecting Improperly Filed Counterobjection and Request for Hearing). In *McDowell* the claimant did not self-object during the objection period. After the objection period closed, the claimant filed a counterobjection to their own claim. The Court rejected the counterobjection based upon the language and structure of the Act, stating:

[T]he Montana Legislature did not intend the counterobjection period to operate as a second objection period for claimants having missed the objection deadline to raise issues regarding their water rights. Acceptance of counterobjections filed by a claimant to their own water right further delays final decree issuance, disserves claimants filing timely objections, and potentially triggers the need for an additional counterobjection period.

There is no discernable difference between acceptance of McDowell's counterobjection and acceptance of a late objection in violation of the clear statutory deadlines set by the Montana Legislature. The water court

declines to consider counterobjections filed by claimants to their own water rights.

McDowell, at *3-4; *see also*, *In re Erb*, 2016 Mont. Water LEXIS 2, *21 (“Erbs’ right to counterobject is triggered by the filing of a timely objection to their claims”); *In re Windbreak Ranch LLC*, 2022 Mont. Water LEXIS 536, *6. (“[t]he right to file a counterobjection is restricted to those parties whose claims received objections and applies only to the claims of an objector”).

Brewer Ranch does not cite these cases, nor does it offer a different analysis as to how the text of the Act can be construed to allow a claimant to counterobject to their own water right claims. Instead, Brewer Ranch argues the Water Court has “a long practice of accepting a claimant’s counterobjections to its own water rights.” (Response, at 2). The Court acknowledges that in certain instances, a claimant or party could mistakenly use a counterobjection form to file an objection, or use the counterobjection form to respond to an objection. *See, e.g., Johnson v. Unites States (Dep't of Agric. Forest Serv.)*, 2022 Mont. Water LEXIS 668 (master’s report). However, neither of these scenarios address the fact pattern here where a claimant uses the counterobjection form and to seek to cure the failure to timely file a self-objection. Absent a case or statutory analysis demonstrating why the Court may allow a claimant to circumvent the mandatory objection deadline via the counterobjection process, the Court declines to accept Brewer Ranch’s objection to the Master’s order.

2. *Should the Court accept the motions to amend?*

Brewer Ranch’s response alternatively asks the Court to accept Brewer Ranch’s proposed modifications to the claims by granting motions to amend the claims.

The Water Use Act allows a claimant to move to amend a water right claim. Section 85-2-233(6), MCA. Unlike the objection provisions, the Act does not set specific deadlines to file motions to amend, nor does it always bar them after issuance of a preliminary decree. For example, the Court may allow a post-decree motion to amend as a procedural mechanism to resolve issue remarks or objections. *E.g., Williams Ranches Inc. v. Josephson*, Case 39F-0062-R-2021; 2021 Mont. Water LEXIS 1093. The Act also

provides procedural protections to other water users by requiring additional notice when the Court determines a motion to amend “may adversely affect other water rights.” Section 85-2-233(6)(a)(i), MCA; *see, e.g., In re Circle S Ranch, Inc.*, Case 41P- 108; 2019 Mont. Water LEXIS 8 (Order on Motion to Modify Claims).

While the Water Use Act does not prohibit post-preliminary decree motions to amend, it also does not authorize them in all circumstances. The motion to amend provision is in the same code section as the objection provisions. Section 85-2-233, MCA. When construing the motion to amend statute, the Court must harmonize it in such a way as to not nullify the objection provisions of the statute. Section 1-2-101, MCA; *Mont. Indep. Living Project v. City of Helena*, 2021 MT 14, ¶ 11, 403 Mont. 81, 86, 479 P.3d 961, 964 (courts “construe statutory language as a whole and in light of its surrounding sections to avoid conflicting interpretations”). If parties are allowed to use the motion to amend provisions to cure the failure to file a timely objection, the motion to amend provision would conflict with the objection provisions and cause the objection deadlines imposed by the legislature to become meaningless. A post-objection period motion to amend that amounts to a disguised late objection is not within the scope of what the motion to amend statute allows. *See, e.g., Open Cross Ranch, Inc.*, 2019 Mont. Water LEXIS 7 (Order Denying Request to Amend Claim).

Given the interplay between the objection deadline and motions to amend, the Court declines to grant Brewer Ranch’s motions to amend. Brewer Ranch filed the motions to amend shortly after the objection period closed. The motions do not directly respond to issue remarks or objections. Brewer Ranch did not offer any explanation why a timely objection could not have been filed. There also is no indication Brewer Ranch learned information after the objection period closed that was not available previously. The motions do not identify any clerical errors. Absent any such facts, the Court concludes Brewer Ranch’s motions are the functional equivalent of late objections, which the Act forbids. However, this conclusion is without prejudice as to any motion to amend that is necessary after case consolidation to address issue remarks or objections.

3. *Should the Court call in the claims on motion to address the counterobjections?*

Brewer Ranch's final argument asks the Court to use its authority to call claims in on motion to "issue an order to determine whether the above captioned claims as decreed accurately reflect the historical use of the water right claims or whether they should be amended to reflect the historical uses described in Mr. Brewer's sworn statement." (Response, at 5). As Brewer Ranch accurately notes, the Water Court's adjudication rules allow it to "issue such orders on its own motion as may be reasonably required to allow it to determine whether a claim accurately reflects its claimed pre-July 1, 1973 beneficial use." Rule 8, W.R.Adj.R.; *see Matter of Water Court Procedures*, Case No. WC-92-3, 1995 Mont. Water LEXIS 7 (describing "on motion" authority and process). But that does not mean the Court must issue such orders to address issues parties could have raised in timely objections. Allowing such a process here also would open the door to providing a procedural mechanism for late objections beyond what the legislature has authorized. Additionally, whether to utilize Rule 8 and address an issue on the Court's own motion is a matter within the Court's discretion. While the Court has no reason to question the veracity of the representations made in the Brewer Statement, they do not provide a basis for the Court to exercise any discretion it might have to use Rule 8 to address the failure to file a timely objection.

ORDER

Therefore, it is ORDERED, that each of the requests contained in Brewer Ranch's Response is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW

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****Service List Updated 5/9/23****

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